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No. 741

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

W. E. MURPHY, Director of Alcoholic Beverage Control; JOHN ANDERSON, JR., Attorney General of the State of Kansas; ARDEN RHYNE, Sheriff of Leavenworth County, Kansas; and JAMES E. FUSSELL, County Attorney of Leavenworth County, Kansas,
Petitioners,

vs.

W. B. LOVE, an Individual Doing Business As THE LOVE TRANSFER COMPANY, Weston, Missouri,
Respondent.

BRIEF FOR THE RESPONDENT
In Opposition to the Granting of the Petition for a Writ of Certiorari.

HOMER DAVIS,
Manufacturers Bank Bldg.,
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OPINION BELOW.

Copied in Appendix B-Petition for Certiorari.

JURISDICTION.

Petitioner involves Jurisdiction of this Court under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Did the seizure in this case constitute an interference or burden on an interstate shipment in violation of the commerce clause of the United States Constitution?

2. Does the State of Kansas or its Agents have authority to levy any tax on the liquor seized in this action?

3. Can the State of Kansas or Respondents invoke a Federal Criminal Statute, i. e., The Assimilative Crimes Act, 18 U. S. C., Sec. 13?

STATUTES INVOLVED.

Set out in Appendix in Petitions.

STATEMENT.

The Petitioners' Statement of Facts adequately sets forth the facts.

ARGUMENT.

The real question presented is whether Kansas was empowered to stop this interstate shipment of liquor from Missouri to the Fort Leavenworth Military Reservation because the shipment did not have attached Kansas liquor revenue stamps. No question is raised but that the Military Reservation is a separate entity and constitutes no part of the State for general jurisdictional purposes. See Pacific Coast Dairy v. Dept. of Agriculture of California, 318 U. S. 285. Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525. Therefore it is conceded the seizure in this case is an interference with Interstate Commerce and a burden thereon, unless there is statutory authority therefor.

By Chapter 66, Sec. 1 of the Laws of 1875, Kansas ceded exclusive jurisdiction of the Fort Leavenworth Military Reservation to the United States, reserving only the right to serve criminal and civil process thereon and also the right "to tax the property and franchises of any railroad, bridge, or other corporations within the boundaries of such lands." No rights were reserved to levy or collect such taxes as are here involved.

Does the Buck Act of 1940, Section 105 (a), 4 U. S. C., give the State the right to levy and collect sales and use taxes with respect to the sale or use of property where the transactions in whole or in part occurred on a Reservation? Under Section C of the Compensating Tax, 79-3701, General Statutes of Kansas, 1949, certain exemptions are listed to the use Tax Section C reads:

> "In respect to the use, storage, or consumption of any article of tangible Personal Property, the sale or use of which has already been subjected to a tax equal to, or in excess of, that imposed by this Act, whether under the laws of that (this) State or some other State of the United States."

The above clearly holds that where Missouri taxed this liquor, as it did, by Sales tax and also by Gallonage Tax, that then under the Kansas Compensating Tax Act, and the above exception, the State of Kansas cannot again tax it under the Kansas Compensating Tax Act. Therefore, even if the Federal Buck Act is valid under Kansas law and the admitted facts of this case, the Buck Act does not apply.

The Kansas Gallonage Tax Act, Section 41-501, General Statutes of Kansas 1949, specifically provides that the tax applies to liquor sold by a manufacturer or importer *for sale in Kansas.*

Section 5 of the Act reads in part:

> "Nor is the tax imposed upon the privilege of engaging in any business of interstate commerce, or otherwise, which business may not, under the Constitution and Statutes of the United States be made subject of taxation by the State."

In Boeing Company v. Commission of Revenue and Taxation, 153 K. 712-15, in speaking of this Statute 79-3703, the Court said:

> "G. S. 1939 Supp., 79-3703, provides that a similar tax of 2% shall be collected for the privilege of using within this State any tangible personal property based on its purchase price, *except where a sales tax has been collected thereon pursuant to 79-3603 or otherwise.*"

Section 106 of 4 U. S. C. (Buck Act), in part states:

> " . . . and such state or taxing authority shall have full Jurisdiction and Power to levy and collect any such tax *in any Federal Area* within such State to the same extent and with the same effect as though such area was not a Federal Area."

The power granted is to levy and collect any such tax, "*in any Federal Area,*" not to levy and collect the tax from the common carrier even before the shipment reaches the Federal Area, as Petitioners did in this case. It is claimed that since Kansas has a right to levy a Sales or Use tax on this shipment, that therefore, the

shipment is one "into Kansas and not through Kansas", that this is what the Buck Act means. The mere right to levy or collect a tax on this shipment or on goods being transported in Interstate Commerce by a State does not change or alter the fact that the shipment is one in Interstate Commerce. None of the cases cited by Petitioners so hold.

As was said in the opinion of the Circuit Court herein, the difficulty is that Kansas has not by statute or regulation provided for the collection of liquor taxes with respect to liquor purchased on the Reservation, or purchased in States other than Kansas, and shipped in Interstate Commerce to the purchaser on the Reservation; that Kansas does not seek to collect a tax from the purchaser of this liquor. In fact, it concedes that under its laws there is no way in which the purchaser could pay the Kansas tax; that the effect of what it seeks to do by its laws and regulations is to stop entirely all interstate transportation of liquor to inhabitants of the Reservation and force them to come into Kansas and buy all liquor, to be consumed on the Reservation, from a licensed retail liquor dealer in Kansas; that it is one thing to say that Kansas may by statute and regulation promulgated thereunder provide for the collection of its liquor tax on liquor going to the Reservation or sold on its Reservation. It is quite another thing to say that it may control or regulate the purchase of liquor on the Reservation or to entirely prohibit shipment in Interstate Commerce of liquor purchased outside Kansas for delivery to the Reservation.

In Miller Bros. v. State of Maryland, 347 U. S. 340; 74 S. Ct. 535; Rehearing denied May 3, 1954, 347 U. S. 964, while speaking of power to tax a common carrier of goods in transit, the Court said:

> "We do not understand the State to contend that it could lay a use tax upon mere possession of goods in transit by a carrier or vendor upon entering the State, *nor do we see how such a tax could be consistent with the Commerce clause.*"

If Petitioners could not stop the common carrier in this case to lay a use tax on the shipment, then they certainly had no authority to stop him at all. The Buck Act only says the tax is to be collected within the Federal Area.

It never reached the Federal Area in this case.

ASSIMILATIVE CRIMES ACT.

In disposing of the argument on the above Act the Circuit Court said:

> "It is argued that the Assimilative Crimes Act makes the criminal provisions of the Kansas Liquor Control Act applicable to Military Reservations and hence the issuance of the injunction aids in the Commission of a violation of the Criminal Code of the United States. Since there is no State law prohibiting the importation in Interstate Commerce of the liquor into the Reservation, there is no violation of a Kansas Criminal Statute. At most there was a violation of the provision making it unlawful to have possession in Kansas of liquor not bearing the Kansas revenue stamps. But liquor passing across Kansas in Interstate Commerce does not come to rest in Kansas, and, therefore, the law making it unlaw-

ful to have possession in Kansas, liquor without Kansas revenue stamps attached thereto has no application to such shipments."

CONCLUSION.

To construe the Buck Act liberally is one thing—to restrict the provisions of the Commerce Clause of the United States is another thing.

HOMER DAVIS,
Attorney for Respondent.